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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, ET AL.,

Appellants,

VS.

STATE OF MISSISSIPPI,

Appellee.

BRIEF FOR APPELLEE

EXPLANATION

Inasmuch as counsel for the State have already filed a brief and a supplemental brief, I deem it necessary to state to the Court that the Clerk of this Court notified counsel for appellee that this case would be called for argument during the week beginning December 11th. At the time said brief and supplemental brief were filed counsel for appellant had not given counsel for appellee a copy of his brief.

On the 4th day of December, counsel for appellant did deliver an incomplete typewritten carbon copy of his brief

to counsel for appellee. He has not to this date, December 5th, 1933, delivered us a completed printed copy.

PRELIMINARY STATEMENT

This is an appeal from a decree rendered by the Supreme Court of the State of Mississippi wherein said Court affirmed in part a decree of the Chancery Court of Tunica County.

The State, by its Attorney General, brought suit by attachment in the Chancery Court against appellants for ad valorem taxes, drainage district taxes and fees due the tax collector of said county. The Court found in favor of the State on all items. The Supreme Court affirmed the finding of the Chancellor insofar as the claim for ad valorem taxes were concerned, but reversed and dismissed the bill insofar as the drainage district taxes and the fees due the tax collector were concerned. The only question involved in this case is the ad valorem taxes.

STATEMENT OF THE CASE

The appellants herein own two tracts of land in Tunica County, Mississippi. Each of these tracts were assessed for taxes for the year 1928. On one of said tracts the taxes were paid before they were delinquent. On the other tract, the taxes had become delinquent and were unpaid.

Acting under the provisions of what is now Section 3122, Code of 1930, the Attorney General for and on behalf of the State of Mississippi filed a bill in the Chancery Court of Tunica County, and alleged that the defendants in

said cause owned a tract of land on which the taxes were past due or delinquent, and that it also owned other lands in said county on which the taxes had been paid for the year 1928.

The bill alleged that the defendants were cutting and removing the timber from the land on which the taxes had not been paid, and if permitted to continue so to do that the lands denuded of its timber would not be worth the ad valorem taxes then due on said land.

The bill prayed for an injunction to restrain the cutting of the timber. However, it does not appear that the injunction ever issued. It also prayed that a writ of attachment issue. This writ was issued and was levied on all of the lands described in the original bill. By order of the Court the defendants gave a surety bond in a sum equal to double the amount of the taxes, conditioned to pay any decree that the Court might render against them, and released all of said lands from said attachment.

The Court below found "that the allegations of the original bill herein are supported by the proof, and that complainants are entitled to the relief prayed for" (r. 47), and that the tract of said land had been legally assessed and was liable for the ad valorem taxes, the drainage district taxes and the fees due the sheriff and tax collector, as alleged in the bill, and gave a decree against the defendants and the surety on the bond to release the property from the writ of attachment for each of said sums.

In reference to the property for ad valorem taxes, the

Supreme Court held (r. 51) that "the assessed value is the basis of the debt declared by the statute. It is the valuation fixed by the taxing authorities upon which the tax levy is to be made. Before that valuation can be conclusively fixed and become the basis of the debt for which an action may be brought, the tax payer must have his day in court on personal service of process * * * * The fact that appellants are non-residents has no bearing on the question because they appeared and answered the bill. They were before the Court and stood exactly like they would had they been residents of the State and had been personally served with summons."

In reference to the claim for drainage district taxes (r. 58) the Court held that "Section 3122 of the Code does not cover drainage taxes. It only covers state, county, municipal and levee board taxes, whether ad valorem, privilege, excise, income or inheritance." The Court further held: Under our drainage district taxes the assessments are a charge or lien on the lands against which they are assessed. They do not constitute a debt against the landowner and cannot be enforced as such. No other property of the land owner can be subjected to their payment."

In reference to the claim for fees, costs, etc., due the tax collector, the Court held that under the law he had not earned such fees and was not entitled thereto. (r. 61)

The Court affirmed the decree of the Chancery Court insofar as the claim for ad valorem taxes was concerned, but reversed the decree in reference to the drainage dis-

trict taxes and the fees and costs due the tax collector, and dismissed the bill as to these items.

STATEMENT OF POINTS

The argument for the appellee will be made under the following headings or points, to-wit:

POINT I.

This Court is without jurisdiction in this case

(A) Because the Federal questions here complained of were not raised in the Court below.

(B) Because the Court held that the proceedings in Court and not the tax assessment fixed the personal liability of the non-resident tax payer. This does not involve a Federal question.

(C) Because the Federal questions attempted to be raised here have been foreclosed and precluded by previous decisions of this Court.

POINT II.

The decree and opinions of the Supreme Court of Mississippi do not take appellants' property without due process of law in violation of Article 14 of the Constitution of the United States. (See appellants' Point No. 1 R. 89)

POINT III.

The decree and opinions of the Supreme Court of Mississippi do not deny the non-resident appellants privileges

and immunities possessed by citizens of the State in violation of Section 2, Article 4, and Article 14 of the Constitution of the United States. (Appellants' point II. r. 90)

POINT IV.

The construction of what is now Section 3122, Code of 1930, was for the Supreme Court of the State of Mississippi and this Court is bound thereby unless the statute as construed violated the Federal Constitution. (Appellants' Point II, second paragraph, r. 90).

POINT V.

The question of the jurisdiction of the Chancery Court is a question for the State Court to determine, and this Court is bound thereby.

BRIEF AND ARGUMENT.

POINT I (A).

THE FEDERAL QUESTIONS HERE COMPLAINED OF WERE NOT RAISED IN THE COURT BELOW.

At a former day of this term of the Court it entered an order pretermitting the determination of its jurisdiction until a hearing of this cause on its merits. I will, therefore, briefly discuss the jurisdiction of this court in the case at bar.

The law is well settled that unless the federal questions are sufficiently raised in the State Courts that this Court does not have jurisdiction to determine such questions.

Appellants in the Court below filed assignments of errors, assigning seventeen alleged errors committed by the trial court. (r. 51).

Assignments No. 1 to 16, both inclusive, are in reference to the admission or exclusion of evidence in the trial of said cause.

Assignment No. 17 is as follows:

> "The court erred in rendering and entering each and every part of the decree against the defendants and the surety on their bond.'"

Rule 6 of the Revised Rules of the Supreme Court of Mississippi, adopted in 1918, the last rules adopted by said Court, is as follows:

> "RULE 6, ASSIGNMENT OF ERRORS. 1. On or before the return day the appellant shall file an assignment of errors which shall set out separately and particularly each error asserted and intended to be argued. * * * *
>
> "2. No error not distinctly assigned shall be argued by counsel except upon request of the court, but the Court may, in its option, notice a plain error not assigned or distinctly specified."

It is clear that assignment of error No. 17 is the only one that raises any question except in reference to the evidence, and it certainly cannot be said that this assignment raises any Federal question, or any other question except in a vague, indefinite and general way. It does not "set out separately and particularly each error asserted." The trial Court would, therefore, have been warranted in not con-

sidering said assignment. Said assignment is not sufficient to raise a Federal question so that it may be decided or determined by this Court.

It appears, however, that the Supreme Court did not follow the requirements of said rule, and Judge Anderson in the opinion of the Court (r. 55) states as follows:

> "The case presents the following questions for decision:
>
> "1. Whether the lands were legally assessed for their ad valorem taxes.
>
> "2. Whether section 3122, Code of 1930, declaring every lawful tax a debt, for which action may be brought, violates the due process provisions of the state and federal constitutions.
>
> "3. Whether drainage district taxes come within the provisions of that statute.
>
> "(Fol. 93) 4. Even though drainage district taxes do not come within the provisions of that statue, whether or not, under the allegations of the bill, the state had the right to subject other property of appellants to the payment of such taxes than the property against which they are assessed.
>
> "5. Whether the state has the right to recover the statutory fees, costs and damages chargeable against lands delinquent for their taxes, where they have been advertised for sale by the tax collector, but not sold.
>
> "6. Conceding that the statute includes the taxes involved, whether or not the state had

> the right to bring this suit before the tax collector of the county had exhausted the statutory remedy provided for the collection of such taxes."

At page 6 of statement as to jurisdiction filed by appellant in this Court, he concedes that question Number I was determined against his contention and that the decision of the Supreme Court foreclosed any consideration of that question in this Court. Questions 3, 4, and 5, which are in reference to drainage district taxes and the fees and costs and damages charged against the lands in favor of the tax collector were determined in favor of appellants, and these questions are not involved in this case.

Question No. 6 was determined against appellants. However, the determination of this question is not raised here, and if it were, the decision of the State Court would preclude this Court from determining the question.

Question No. 2 was determined against appellants, the Court holding that the personal liability of the appellants could only be determined after personal service of process or appearance of the appellants in Court (r. 57); that is, that the personal liability could be fixed only after a hearing, and that the due process requirements were met by a hearing after summons or appearance.

There is nothing in the assignments of error nor in the statement of questions by the Court that in any way indicates that the question of discrimination was raised or mentioned in the Supreme Court of Mississippi.

After said opinion was delivered by the Court, counsel

for appellants filed an elaborate suggestion of error. (r. 73). However, he does not in any of the numerous sggestions of error complain that any question presented to the Court on the previous argument was omitted by said Court. ~~He does not complain that he is being deprived of his property without due process of law.~~ It, therefore, conclusively appears that the question of the violation of Section 2, Article 4, of the Constitution, and of Article 14, insofar as it guarantees equal rights and privileges was not raised or decided by the Supreme Court of Mississippi.

This Court has no jurisdiction unless it appear affirmatively not only that the Federal question was presented for decision but that its decision was necessary to a determination of the cause, and that it was actually decided.

The assignment of errors in this case does not mention any constitutional provision. In other words, from reading the assignment of errors it cannot be determined that appellant is relying upon his constitutional rights. Not only this, but after the Supreme Court had decided this case, appellant filed a suggestion of errors and enumerates eleven separate and distinct alleged errors. ~~However, even in this suggestion of error he does not raise the question as to whether or not he was denied due process of law.~~ Assignment No. 11, ~~the only one mentioning appellant's constitutional rights~~ does state as follows:

> "The Court erred in denying the appellants the equal protection of the laws as provided in the Fourteenth Amendment to the Federal Constitution, which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'."

See Brief No 2
D D No 72

In other words, he does claim that Section 14 is violated, but *he does not complain that the due process clause of this section is violated*, but bases his constitutional rights upon the "equal protection" guaranteed by this section.

It, therefore, conclusively appears that in the Court below complainant never complained of the violation of the due process clause of the Constitution.

In *Dewey vs. City of Des Moines*, 173 U. S. 193, 43 L. ed. 665, this Court holds as follows:

> "In *Oxley Stave Co. v. Butler County*, 166 U.S. 648, it was held that the Federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the Constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakable manner, and unless he do so this court is without jurisdiction to re-examine the final judgment of the state court upon that matter. See also *Levy v. Superior Court of San Francisco*, 167 U. S. 175; *Kipley v. Illinois*, 170 U. S. 182."

C. & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed 127;

Parker vs. McLain, 237 U. S. 469, 59 L. ed. 1051;

First National Bank vs. City Council of Estherville, 219 U. S. 341, 54 L. ed. 223;

Bachtel vs. Wilson, 204 U. S. 36, 51 L. ed. 357;

Leathe vs. Thomas, 207 U. S. 93, 52 L. ed. 118;

White River Lumber Co. vs. State of Arkansas, 279 U. S. 692, 73 L. ed. 903;

Bothwell vs. Buckbee-Mears Co., 275 U. S. 274, 72 L. ed. 277.

POINT I (B).

THE COURT HELD THAT THE PROCEEDINGS IN COURT AND NOT THE TAX ASSESSMENT FIXED THE PERSONAL LIABILITY OF THE NON-RESIDENT TAX PAYER. THIS DOES NOT INVOLVE A FEDERAL QUESTION.

The Court held that what is now Section 3122, Code of 1930 furnishes a basis for imposing a personal liability for taxes on property in Mississippi. It further held that this personal liability could be fixed only as provided in said section; that is, by a personal service of process or by the personal appearance of the non-resident tax payer. In the case at bar, the State was proceeding against the property of the appellants in this State for taxes that were past due and delinquent. It had a right to do this.

In the case of *Dewey vs. City of Des Moines*, 173 U. S. 193, 43 L. ed. 665, the court holds that "the power to tax is, however, limited to persons, property and business within the state, and it cannot reach the person of a non-resident." This case certainly does not hold that the State cannot reach the property of a non-resident which is located within the State for taxes due the State. The procedure

instituted by the Attorney General was to subject the property of the non-resident appellants within the state to the payment of the debt due for taxes. The non-resident appellants came in and appeared by their answer, and not only did they appear, but by their bond to release the property attached they released the property of the appellants within the state. In other words, the bond filed by the non-residents and their surety was taken by the Court in lieu of the lien created by the writ of attachment against the property of appellants.

The complaint here is that the state is taking property other than the property assessed for the payment of the taxes. The giving of the bond and the release of the property pretermitted this question. The Court held that after the appearance and the giving of the bond the appellants "stood exactly like they would had they been residents of the State and had been personally summoned."

POINT I (C).

THE FEDERAL QUESTIONS ATTEMPTED TO BE RAISED HERE HAVE BEEN FORECLOSED AND PRECLUDED BY PREVIOUS DECISIONS OF THIS COURT.

In the case at bar the Court held as follows:

> "The assessed value is the basis of the debt declared by the statute. It is the valuation fixed by the taxing authorities, upon which the tax levy is to be made. Before that valuation can be conclusively fixed, and become the basis of a debt for which an action may be brought, the taxpayer must have his day in court on personal service of

process. The last clause of this statute furnishes such a hearing in providing that the assessment roll shall only be prima facie correct. If it is only prima facie correct, that means, of course, the taxpayer is given an opportunity to show the correct valuation; and in attempting to do so, the same considerations are taken into account as would have been by the board of supervisors at its equalization meeting where the taxpayer had challenged the assessment. The fact that appellants are non-residents has no bearing on the question because they appeared and answered the bill. They were before the Court, and stood exactly like they would had they been residents of the state, and had been personally served with summons.

"It is true that in the Delta Pine Land Compnay case, and in the George Co.-Bridge Co. case, the taxpayers had, before suit was brought, appeared before the board of supervisors and contested their assessments. We are unable, however, to see how that, on principle, differentiates this case from those cases. In other words, in those cases the taxpayers had two hearings on the issue of the valuation of their property, and in the case at bar the taxpayer had only one hearing. Due process requires only one hearing—not two.

"Section 3122 of the Code does not cover drainage district taxes; it only covers state, county, municipal and levee board taxes, 'whether ad valorem, privilege, excise, income or inheritance.' The state contends, however, that because of the following facts it had the right to fix the drainage taxes as a charge on the other lands owned by appellants, which were attached. Those facts

were that appellants were denuding their lands in the drainage district of their timber, which constituted their principal value; that they would continue to do so until there would be nothing left except the land, which would be insufficient in value to pay the other taxes and the dainage assessment against them for 1928, that when the timber was removed appellants would permit the lands to sell to the state for state and county taxes, and there would be nothing left to pay the drainage assessments; that under the law the drainage assessments were a lien, not only against the land, but the timber standing thereon. The state's contention is that under the law the fact that appellants were destroying the timber which was part of the security for the payment of the assessments, gave it the right to resort to other property owned by appellants for the payment of the assessments, although such assessments are not debts for which a personal judgment may be recovered." (r. 57-58).

In *George County Bridge Company vs. Catlett*, 161 Miss. 120, text 131, the Court in construing the statute in controvesy held as follows:

"Appellant contends that the statute violates due process because it fails to provide for the personal service of process on the taxpayer giving him notice and an opportunity to be heard at the equalization meeting of the board of supervisors. In considering this question, it should be borne in mind that the assessment of appellant's property was, in every respect legal. There was no attack made upon it in the court below, nor is there any made in this court. The last clause of the statute

provides that, in all actions for the recovery of ad valorem taxes (the kind of taxes here sued for) 'the assessment roll shall only be prima facie correct.' If the law made the assessment roll conclusive as to the amount of taxes due by the taxpayers, the appellant's position would raise a very grave question; but that is not true, the assessment roll is only prima facie correct. That means that the presumption of its correctness is rebuttable. *New Orleans & G. N. R. R. Co. v. Walden* (Miss.) 133 So. 241. Therefore, when an action is brought for taxes, under this statute, the taxpayer is of course summoned into court by process personally served, and there given an opportunity to be fully heard, and on the trial he will be permitted to rebut if he can, the prima facie correctness of the assessment roll.

"The Supreme Court of the United States, in the case of *McMillen vs. Anderson*, 95 U. S. 37, 24 L. ed. 335, held that a statute which gives the taxpayer the right to enjoin the collection of the tax charged against him, and to have the validity of such tax decided by the court, furnishes the taxpayer due process of law, notwithstanding the statute requires that the taxpayer give security in advance as in other injunction suits."

These decisions clearly and unequivocally hold that when a tax payer is sued under the provisions of said section he is entitled to have his day in court; that is, he must be summoned by personal process or he must appear in court for answer or other pleading and submit to the jurisdiction of the Court. In the George County Bridge Company case personal service was had. In this case, defendants answered the bill and gave a bond to release the prop-

erty from the writ of attachment. Of course, the Court below could not have given a personal judgment against the appellants if they had not been personally served or if they had not appeared and answered said bill.

Appellant contends that the personal liability of the non-resident appellants was fixed by the assessment. This is not true. The statutes of the State do fix the liability for taxes due. However, as held by the Court, in this case the taxpayer had a right to make the same defense that he could have made at the time the property was assessed.

Assuming for the sake of argument that the assessment of taxes by the State of Mississippi against lands of appellants was a personal judgment against the appellants, yet they cannot complain that they were not afforded due process of law by said statute as construed by the opinions of this Court.

In *American Surety Company vs. Baldwin*, 287 U. S. 156, 77 L. ed. 231, a judgment was given without notice against the surety on an appeal bond. The surety company contended that the judgment was void because it was rendered without due process of law. The Court said as follows:

> "It is true that entry of judgment without notice may be a denial of due process even where there is jurisdiction over the person and subject matter. But that rule is not applicable here. For if the bond properly construed stayed the judgment as against Anderson, the Surety Company consented to the entry of judgment against

it without notice for his failure to pay. If the bond did not stay the judgment as against Anderson, the trial court confessedly erred in entering the judgment on the bond. In order to contest its liability the Surety Company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

"The practice prescribed was constitutional Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. *York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 S. Ct. 9. Compare *Grant Timber & Mfg. Co. v. Gray*, 236 U. S. 133, 59 L. ed. 501, 35 Sup. Ct. Rep. 279; *Bianchi vs. Morales*, 262 U. S. 170, 67 L. ed. 928, 43 S. Ct. 526. See also *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 596, 597, 75 L. ed. 1289, 1296, 1297, 51 S. Ct. 608; *Coffins Bros. v. Bennett*, 277 U. S. 29, 72 L. ed. 768, 48 S. Ct. 422. An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law."

A re-hearing of the above styled cause was denied on January 9th, 1933.

In *Moore Ice Cream Co. vs. Rose*, 289 U. S. 373, 77 L. ed. 1265, the Court quoted and approved the opinion just cited, holding as follows: "Due process requires that there be an opportunity to present every available defense; but it need not be before the entry judgment. *American Surety Company vs. Baldwin*, supra; *York vs. Texas*, 137 U. S. 15, 34 L. ed. 604."

Our Court holds that under said statute the taxpayer has a right to his day in Court and that he can make any and all defenses in said court that he could have before the original assessing body. The appellants are, therefore, precluded from raising this question by the prior decisions of this Court, it being well settled that a construction of a state statute by the state court is binding upon and will be upheld by this Court.

The construction placed upon a state statute by the highest court of the State must be accepted by the United States Supreme Court on review as though it had been specifically expressed in the statute.

A. T. & S. F. Ry. Co. vs. Railroad Commission, 283 U. S. 380, 75 L. ed. 1128;

Saltonstall vs. Saltonstall, 276 U. S. 260, 72 L. ed. 565;

Keith vs. Johnston, 271 U. S. 1, 70 L. ed. 795;

Swiss Oil Corporation vs. Shanks, 273 U. S. 407, 71 L. ed. 709;

Appleby vs. City of New York, 271 U. S. 364, 70 L. ed. 992.

POINT II.

THE DECREE AND OPINIONS OF THE SUPREME COURT OF MISSISSIPPI DO NOT TAKE APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF ARTICLE 14 OF THE CONSTITUTION OF THE UNITED STATES.

The question of due process has been argued under

Point I (C), immediately preceding this point, and the argument will not be repeated. See also page 19, et seq., brief for appellee heretofore filed in this case.

Under the laws of Mississippi the State has two remedies for the collection of taxes due. One is, under the provisions of Section 3247, et seq., Code of 1930, which authorizes the sale of the property for taxes. The other is, by suit as authorized by Section 3122, Code of 1930, here in controversy.

In the case of *Carriere Lumber Company vs. Quitman County*, 156 Miss. 396, the Supreme Court of this state held that where the state pursued its remedy under the provisions of Section 3247, Code of 1930, that it could not then pursue the remedy afforded by said Section 3122. The rule would be the same when the State follows the procedure provided for in Section 3122; that is, when the State proceeds under said section by suit, it relinquishes its lien for taxes and the right to sell as provided by law. In other words, the State has the right to elect its remedy. In this case it elected to proceed against the property of appellants by attachment. The State is bound thereby and could not afterwards advertise and sell the land under its statutory lien for taxes.

Appellants in this case now concede that the State had a valid lien for the ad valorem taxes on the tract of land on which the taxes had not been paid, and make no complaint to the subjection of this tract of land to the payment of taxes. However, when the suit was instituted, an attachment writ was levied against the land on which the taxes

had not been paid as well as the land on which the taxes were paid. The appellants by filing the bond released all of said property from said attachment writ, thereby releasing all liens and claims the State had against the land on which the taxes were not paid. He admits that the State had a lien against this land for the taxes. He does not deny the validity of the attachment writ. By the giving of his bond he has released the state's lien. In other words, the bond stands in lieu of the lien.

The Court does not hold that the assessed value of the land was a personal liability of the defendants, but does hold that the assessed value "is the basis of the debt declared by the statute." The Court further holds:

> "The fact that appellants are non-residents has no bearing on the question because they appeared and answered the bill. They were before the court and stood exactly like they would had they been residents of the state and had been personally served with process."

Said Section 3122 provides that the taxes due shall be a debt due by the owner. As to residents of this State, this statute has been upheld and applied in the case of *George County Bridge Company vs. Catlett*, 161 Miss. 120. Under the opinion of the Supreme Court of Mississippi in this case the assessment is the basis of the debt, but personal liability cannot be fixed and determined without personal process or the appearance of the taxpayer in Court.

Section 173, Code of 1930, provides as follows:

"The chancery court shall have jurisdiction of

attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any non-resident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such non-resident, absent or absconding debtor. The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance."

This section is the same as Section 536, Code of 1906, Section 293, Hemingway's Code of 1917, and was in effect at the time of the institution of this suit, and said suit was brought under and by virtue of said provisions.

In *Hall Commission Co. vs. Foote*, 90 Miss. 422, the Court held that under the provisions of Section 536, Code of 1906, providing for attachments in Chancery against non-resident debtors, a court of equity may, where a non-resident defendant has appeared and answered the suit render a personal decree against him for the balance of complainant's debt not realized by the sale of the attached property.

In *Branham vs. Drew Grocery Co.*, 145 Miss. 627, the Court, after quoting Section 536, Code of 1906, now Section 173, Code of 1930, held as follows:

"We think the amendment to this section authorized the court, when the defendant appeared

and contested the attachment suit, to enter a judgment in personam.

"In the case of *John E. Hall Commission Co. v. Foote, et al*, 90 Miss. 422, 43 So. 676, cited in the main opinion, it is held that the court may render such personal judgment when the defendant has appeared and contested the liability.

"We think there is no good reason to hold, where the defendant has appeared and submitted himself to the jurisdiction of the court, and contested with complainant the liability, and where it is manifest, after a complete hearing on such personal appearance, that he does owe the complainant that such complainant should be denied the right to recover."

In the trial Court the appellants here contested the entire liability. They contested the validity of the assessment and contended they did not owe any tax.

In *Traveler's Insurance Co. vs. Inman*, 157 Miss. 810, text 821, the Supreme Court of this State again holds that said section authorizes a judgment upon the demand there involved when a person has appeared in a suit in attachment in Chancery.

In the case of *York vs. State of Texas*, 137 U. S. 15, 34 L. ed. 604, the facts as stated by the Court show that the State of Texas brought suit against York, a non-resident of Texas; that no valid service of process was had on York; that after suit was filed the defendant appeared by his counsel and filed a special plea "challenging the jurisdiction of the court on the ground that he was a non-resident

and had not been served personally with process within the limits of the State." The plea was overruled, and at a later date the plea was renewed. "On the 14th day of November, when the cause was reached and called for trial, he again appeared by his attorneys * * * * and declined to further answer to the cause, relying solely upon his plea to the jurisdiction. The court thereupon proceeded to render judgment against him, which, as heretofore stated, was affirmed by the supreme court." In deciding this case the Court held as follows:

> "In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the court before deciding on his own action. In Texas, he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid. And the question is, whether under the constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone.
>
> "The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a state to 'deprive any person of life, liberty or property without due process of law.' And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is

only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the Amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto provided that substance of right is secured without unreasonable burden to parties and litigants. *Antoni v. Greenhow*, 107 U. S. 769. It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the supreme Court or in any of the statutes of the State, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment

> rendered without due service of process and therefore void, deprives him of liberty or property within the prohibition of the Fourteenth Amendment? We think not."

The Mississippi statute and decisions heretofore cited are similar to the rule in Texas; that is, in an attachment in Chancery if the defendant appears he submits himself to the jurisdiction of the Court, and this is the rule followed by the Supreme Court in this State when it held that: "The fact that the appellants are non-residents has no bearing on the question because they appeared and answered the bill."

Appellants, in the trial court, did not appear for the sole purpose of protecting their rights to the land on which the taxes had been paid, but, also to contest the validity of the assessment. They contended they did not owe any tax because the assessment had not been legally made.

Appellants rely upon the case of *Dewey vs. City of Des Moines*, 173 U. S. 193, 44 L. ed. 665.

There is nothing in said case that conflicts with the decision of the Supreme Court of Mississippi. That case was based upon Section 478, Code of Iowa, 1873. This Section, after providing how assessments for special improvements may be made, provides that the assessment is a lien upon the property and shall be payable by the owner. The Section then provides as follows:

> "Such charge may be collected and such lien enforced by a proceeding in law or in equity, either in the name of such corporation, or of any person to whom it shall have directed payment to

have been made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley or highway. Proceedings may be instituted against all the owners or any of them, to enforce the lien against all the lots or land, or each lot or parcel, or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable to each."

This section does not provide that the owner of the property may contest the assessment. The Supreme Court of Mississippi holds that under Section 3122 the property owner may contest the assessment in the suit.

The Supreme Court, in the Dewey case held that making the personal liability apply to a non-resident deprived such non-resident of his property without due process of law. The Supreme Court of Mississippi holds that under the laws of Mississippi the property owner has due process of law, by reason of the fact that he may contest the assessment against his property.

The opinion in the Dewey case further holds that

"The jurisdiction of tax exists only in regard to persons and property, or upon the business done within the State and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident person liable to pay a tax of the nature of the one in question * * * The power to tax is, however, limited to persons, prop

erty and businesses within the State and it cannot reach the person of a non-resident."

This proceedings was brought against the property owned by appellants in Mississippi. In other words, it was a proceedings *in rem*. The State was not attempting to reach the person of the non-resident appellants. However, in order to release the property which the state held under a writ of attachment they executed a bond and submitted themselves personally to the jurisdiction of the court for the purpose of contesting the validity of the assessment of taxes on the land on which the taxes had not been paid.

In *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, the court held as follows:

"Thus it appears that on the return of the delinquent tax list the amount of the tax could be collected by distraint of goods and chattels, or by proceedings by attachment and publication, judgment in which would operate on the property taken in attachment, by garnishment or otherwise. There was no want of due process in all this, for while the non-resident came under the obligation to pay, appropriate notice and opportunity to contest were afforded. And if a personal action were brought and service obtained, the defendant would not be cut off from any competent defense, as the delinquent list would not necessarily be held conclusive. In this case no defense on the merits appears to have been relied on except the want of situs. *Dewey vs. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379, cited by

> plaintiff in error, is not to the contrary. What was rules there was that a citizen of one state cannot be cast in a personal judgment in another state on an assessment levied thereon on real estate for a local improvement, without service on him, or voluntary appearance, or some action on his part amounting to consent to the jurisdiction."

This opinion is clearly in accord with the opinion of the Supreme Court of Mississippi.

The Dewey case holds that you cannot take the property of a non-resident without due process of law; the Bristol case holds that it may be taken with due process of law. The Supreme Court of Mississippi holds that you may take property of a non-resident with due process of law and that the statute in question gives to the appellants due process of law.

POINT III.

THE DECREE AND OPINIONS OF THE SUPREME COURT OF MISSISSIPPI DO NOT DENY THE NON-RESIDENT APPELLANTS PRIVILIGES AND IMMUNITIES POSSESSED BY CITIZENS OF THE STATE IN VIOLATION OF SECTION 2, ARTICLE 4, AND ARTICLE 14 OF THE CONSTITUTION OF THE UNITED STATES.

This question was not raised by appellant in his assignments of error in the court below. (R. 51) It was not discussed by the court in its opinion. It was raised for the first time in the suggestion of error. (R. 73) The objection in the suggestion of error comes too late.

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. ed. 231, wherein the court held as follows:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this court."

The only thing in the record to sustain this contention is an agreement dictated into the record by Mr. Gore, attorney for appellants in the trial court. (R. 38)

> "It is hereby agreed by and between counsel for the complainants and counsel for the defendants that it is the general custom in the State of Mississippi to make sale of lands on which default in the payment of taxes has been made on the First Monday in April of the year succeeding the assessment of the taxes, and that on the first Monday of April 1929, all lands in default for the payment of taxes, except the lands belonging to these defendants were offered for sale and sold by the Tax Collector of Tunica County, Mississippi. It is further agreed that the lands of the defendants in default for the payment of taxes in April, 1929, were the only lands in Tunica County delinquent for taxes from which the merchantable timber had been removed between the date of the assessment and date set for the tax sale."

This agreed part of the record shows affirmatively that there were two classes of delinquent taxpayers in Tunica County. One class had not paid its taxes, but had preserved its property subject to the lien for taxes. The other class, composed of appellants, cut and removed the timber from their property, and this timber constituted the major part of the value of the property.

The right to bring the suit was based on this fact.

It is true, as agreed, that the general custom is for the state to collect its taxes by the sale of the property; however, as shown by the decisions of the Supreme Court in this state, under special circumstances or facts peculiar to isolated cases, the state has brought suit to collect the taxes. See the following cases.

Delta and Pine Land Co. v. Adams, 93 Miss. 340;

Enochs v. State, 128 Miss. 361;

Powell v. McKee, 81 Miss. 229.

It, therefore, appears that the facts in this case clearly distinguishes it from the other delinquent taxpayers in said County, and the state was therefore warranted in electing the remedy pursued.

POINT IV.

THE CONSTRUCTION OF WHAT IS NOW SECTION 3122, CODE OF 1930, WAS FOR THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND THIS

COURT IS BOUND THEREBY, UNLESS THE STATUTE, AS CONSTRUED, VIOLATES THE FEDERAL CONSTITUTION.

Appellants contend that Section 3122, Code of 1930 is a mere rule of evidence. The Supreme Court of the State, however, held that service of process in a suit or the personal appearance of the defendants in a suit brought under this section was due process of law. This court is bound by the construction placed on said statute by the Supreme Court of Mississippi. In other words, this court will read the statute the same as if the construction placed thereon by the Supreme Court was written in the statute.

In *Farncomb vs. Denver*, 252 U. S. 7, 64 L. ed. 424, it was held that the Federal Supreme Court, when dealing with constitutionality of said statutes, challenged under article 14 of the U. S. Supreme Court, accepts the meaning of such statutes as construed by the highest court of the State. See also *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 971; *Corn Products Refining Company v. Eddy*, 249 U. S. 427, 63 L. ed. 689.

See also cases cited under Point 1 (c), page 17, of this brief.

POINT V.

THE QUESTION OF THE JURISDICTION OF THE CHANCERY COURT IS A QUESTION FOR THE STATE COURT TO DETERMINE AND THIS COURT IS BOUND THEREBY.

Appellant complained that the court below erred in

holding that the Chancery Court in Mississippi had jurisdiction to fix the amount of taxes due onthe lands in question.

This question was not raised in the trial court. (See answer to defendants. R. p. 8) It was not raised in assignment of error filed in the Supreme Court. (R. p. 57) It was not discussed by the court. (R. p. 53) It was raised for the first time in the suggestion of error, (R. p. 73) This comes too late.

American Surety Co. v. Baldwin, supra.

The constitution of the State of Mississippi fixes the jurisdiction of its chancery courts and also of its circuit courts. Section 147 of the Constitution, however, provides as follows:

> "No judgment or decree in any chancery or circuit court rendered in a civil cause shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction."

In construing this section, our Court held that the Supreme Court itself, will raise the question of limitation on its powers to reverse or annul a judgment for want of jurisdiction, as provided in said section.

Talbot Lumber Company vs. McLeod Lumber Co., 147 Miss. 186.

The court has further held that in the absence of any other error than want of jurisdiction as provided in said section, the court will affirm the judgment or decree.

Boyett v. Boyett, 152 Miss. 201;

Thompson v. Hill, 152 Miss. 388.

It is further held that the fact that a cause of action set forth in a bill is legal and not equitable presents no ground for reversing the decree.

Carter v. Witherspoon, 156 Miss. 597.

It is also well settled under the jurisprudence of Mississippi that when an equitable court has jurisdiction on one ground, it has jurisdiction to deteremine the whole case.

CONCLUSIONS.

1. We most respectfully submit that this court is without jurisdiction, because the Federal questions here complained of were not raised in the court below, because the opinion of the Supreme Court of Mississippi did not involve a Federal question and because the Federal questions, attempted to be raised here, have been foreclosed by previous decisions of this court.

2. That appellants were not deprived of their property without due process of law.

3. That appellants were not denied equal protection, privileges and immunities.

4. That the Supreme Court has construed Section 3122, Code of 1930 and this court is bound by the construction and that under said Section, as construed, appellants were not denied due process of law.

5. That the question of the jurisdiction of the Chancery Court is a question for the State court.

We, therefore, most respectfully submit that the decree of the Supreme Court of Mississippi in this case should be affirmed.

Respectfully submitted,

STATE OF MISSISSIPPI Appellee,

GREEK L. RICE, Attorney General.

By J. A. LAUDERDALE,
Assistant Attorney General.